Supreme Court, U.S.
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In The

Supreme Court of the United States

RALPH STROUP,

Petitioner,

v.

JO ANNE B. BARNHART,
Social Security Commissioner,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should review the Eleventh Circuit's published affirmance of a final decision rendered by the Commissioner of the Social Security Administration to apply the windfall elimination provision, thereby lessening the Petitioner's earned benefits when such an administrative application of statutory law demonstrates an

1. inconsistency between the circuits as to the judicial notice required to be given to the contents of the Federal Register dictating that eligibility for pension ". . . after 1985 . . ." be determined with respect to ". . . all applicable service used by the pension-paying agency . . ." and when such application of a statute.

2. is justified by a reviewing appellate court applying *Chevron* deference to an administrative determination despite inconsistencies existing between the administration's final decision as authored by an administrative law (trial) judge and the reviewing Appeals Council along with misinterpretations of Congressional intent, a referenced district court decision and the Eleventh Circuit's prior precedent concerning the applicability of regulatory law.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

RALPH STROUP, the Petitioner

JO ANNE B. BARNHART, Social Security Commissioner

RICHARD V. BLAKE, Assistant Regional Counsel, Social Security Administration, Atlanta

CORPORATE DISCLOSURE STATEMENT

There are no corporate interests involved in this litigation.

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Stroup v. Barnhart, 327 F.3d 1258 (11th Cir. April 16, 2003). Appendix 1.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgement on April 16, 2003. Appendix 1. Petitioner, Ralph Stroup, seeks review of that judgement on a writ of certiorari.

On June 2, 2003, the Petitioner timely filed a petition for rehearing and for rehearing en banc in the Court of Appeals. On July 15, 2003, the Court of Appeals filed an order denying both a petition for rehearing and the petition for rehearing en banc. Appendix 20. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgement of a federal court of appeals.

STATUTORY AND REGULATORY PROVISIONS

The primary statutory and regulatory provisions involved are 42 U.S.C. § 415(a)(7)(A) and (B); 60 Fed. Reg. 17,443 (1995); and H.R. Conf. Rep. No. 100-1104 (1998), reprinted in 1998 U.S.C.C.A.N. 5048, 5322. They are reproduced in the Appendix at App. 22 to 28.

STATEMENT OF THE CASE

The Court of Appeals for the Eleventh Circuit in a published opinion, affirmed the district court's unpublished order upholding the final decision of the Commissioner of Social Security in which the windfall elimination provision[1] (WEP) was applied so as to significantly reduce the Petitioner's monthly disability benefit. *Stroup v. Barnhart*, 327 F.3d 1258, 1260 (11th Cir. 2003). Appendix 3.

The WEP was enacted by Congress in 1983 and became effective two years later. Specifically, the WEP was designed by Congress to prevent applicants from receiving more pension benefits (windfall) when their work history involved both "covered" Social Security employment and "noncovered" employment in which Social Security withholdings were not taken. *Johnson v. Sullivan*, 777 F.Supp. 741, 743 (W.D. Wis. 1991).

Although the statute itself mandates that the WEP reduction is to be applied against those individuals who are " . . . first eligible . . . " for a monthly periodic payment " . . . after 1985 . . . ", the Eleventh Circuit in the year 2003 agreed with a 1994 decision issued by the Ninth Circuit which held that the WEP was ambiguous. *Stroup*, at 1260-61 and *Das v. Department of Health and Human Servs.*, 17 F.3d 1250, 1253-54 (9th Cir. 1994). The Ninth Circuit wrote in 1994, that the WEP could mean that those who have satisfied the basic qualifications of a pension prior to

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[1] 42 U.S.C. § 415(a)(7)(A) and (B) along with § 215(a)(7)(a) of the Social Security Act are recognized as the windfall elimination provision (WEP). Appendix 22.

1986 should be exempted from the application of the WEP reduction **or** in the alternative, the WEP could also be found to support the Commissioner's contention that the WEP is " . . . inapplicable only to those who prior to 1986, have met all prerequisites to the payment of benefits." *Das*, at 1254. After identifying this perceived ambiguity in the statute, the Eleventh Circuit then applied *Chevron*[2] deference to the administrative application of the WEP. *Stroup*, at 1261-62. Appendix 8. The Petitioner asserts that the Commissioner's application of the WEP is not worthy of *Chevron* deference. The Petitioner argues that the agency's position is not based upon a permissible construction because it was administratively applied contrary to the plain meaning of the statute (" . . . first eligible . . . " " . . . after 1985 . . . "), arbitrary and inconsistent with the Commissioner's own regulations[3].

ARGUMENT

A. The Court of Appeals decision conflicts with another circuit in that judicial notice was not accorded to the contents of the Federal Register.

The Eleventh Circuit's April 16, 2003 opinion does not address an important point concerning the Federal Register which was raised by the Petitioner at oral argument on

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984).

[3] 20 C.F.R. § 404.213 uses the term "eligible" in reference to the pension paying agency.

January 9, 2003. The Petitioner argued that the aforementioned ambiguity was clarified and cured by the Commissioner's Office in later regulatory law[4]. Approximately 13 months after the *Das* decision, the Commissioner specifically addressed the referenced ambiguity on April 6, 1985. According to the Commissioner in 1985, the term " . . . first becomes eligible . . . " was to be interpreted with respect to " . . . all applicable service used by the pension paying agency, regardless of when the service was acquired." 60 Fed. Reg. 17,443 (1995). Appendix 24. The aforementioned citation to the Federal Register pertains to 20 C.F.R. § 404.213. Unfortunately, the Eleventh Circuit did not seem to appreciate that the " . . . interstitial nature of the question at hand . . . " had been bridged by the Commissioner herself in 1995. *Stroup*, at 1261. Appendix 7.

Although the Petitioner insists that the meaning of the statute is clear and plain as it pertains to him, he also asserts that any perceived ambiguity or uncertainty was cured. The Petitioner asserts that this point concerning the Federal Register is significant because the contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507) and the Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510). See also, *Wei v. Robinson*, 246 F.2d 739, 743, *certiorari denied*, 355 U.S. 879, 2 L.Ed.2d 109, 78 S.Ct. 144 (7th Cir. 1957). In particular, the Eleventh Circuit's opinion in this case which makes no reference to the cited Federal Register, is certainly not consistent with the precedent as

[4] Statutory law is that body of law created by acts of a legislature. Other types of law are found in judicial opinions and administrative regulations/publications.

exhibited by the Seventh Circuit in two cases. In the cases of *Imani on behalf of Hayes v. Heckler*, 797 F.2d 508, 511, n.1 (7th Cir. 1986) and *Wei*, the Seventh Circuit properly relied upon and made specific reference to the Federal Register.

Respectfully, the Petitioner requests that his eligibility for an Indiana State pension following 20 years of service on December 31, 1985 be respected as required by the Federal Register. According to the State of Indiana, the Petitioner was in fact "eligible" for pension benefits following his work shift which ended at 4:00 p.m., on December 31, 1985. *Stroup*, at 1259. Appendix 2, 15, 16. Since he was "eligible" for a state pension in 1985, not after 1985, the Petitioner asserts that he should not be subject to the WEP reduction.

B. The Court of Appeals opinion reinforces the Commissioner's improper utilization of her own regulatory law.

While only referring to the definition for "entitled" found at 20 C.F.R. § 404.203, the Appeals Court and the Commissioner have overlooked 20 C.F.R. § 404.303 which specifically distinguishes between the terms "eligible" and "entitled". *Stroup*, at 1261 n.4. Appendix 5.

The Commissioner has applied the WEP reduction against the Petitioner on the premise that the Petitioner was not first "entitled" to receive a pension until January 1, 1996 (after 1985). However, the Commissioner's final decision uses the term "eligible" instead of "entitled". (Administrative Transcript 11).

This essentially means that the Commissioner has administratively elected to adopt an alternative definition

of eligibility requiring the actual receipt of (proven) benefits over the regulatory mandate that defines eligibility as simply meeting the requirements for the " . . . entitlement to benefits . . . " (i.e., meeting the requirements for an Indiana state pension for a period of time, "but has not yet applied.") 20 C.F.R. §§ 404.303 and 404.213. As mentioned above, the Commissioner's alternative definition for eligibility has been administratively favored over the reliance on the "pension-paying agency" (State of Indiana) that is mandated by regulatory law. 60 Fed. Reg. 17,443 (1995). Reference *Stroup*, 1262. Appendix 7.

As previously held by the Eleventh Circuit, an agency is subject to the limits of statutory law and deviation from her own regulations may justify judicial relief. *Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984). See also, 5 U.S.C. §§ 551 et seq., 551(4), 553(a)(1), (b)(A, B), (c).

C. The Court of Appeals decision fails to follow an existing Supreme Court opinion.

In *Barnhart v. Walton*, 535 U.S. 212, 217-22, 152 L.Ed.2d 330, 122 S.Ct. 1265 (2002), this Court wrote that the " . . . careful consideration . . . " given by an agency of the Federal Government " . . . over a long period of time . . . " is one of the factors to consider when determining whether *Chevron* deference should be accorded to legal determination or acts of a governmental agency. *Walton*, 535 U.S. at 222. The Petitioner argues that *Chevron* deference should not have been applied to the administrative decision for the following reasons.

First, the Petitioner believes that the inconsistency pertaining to the interpretation of the terms "eligible" and

"entitled" along with the Commissioner's final decision[5] as authored by an administrative law judge (ALJ) which contains no reference to the aforementioned regulatory law is not substantially grounded. The Commissioner's final decision should have included a complete interpretation of both the applicable statutory and regulatory law. Unfortunately, the Petitioner is left with a final administrative explanation that shows absolutely no consideration (also, no " . . . careful consideration . . . " as required by *Walton*) of the applicable regulatory law.

Secondly, the Petitioner asserts that the Commissioner's Appeals Council's rationale is inconsistent with the ALJ's decision in that the Appeals Council would not have permitted exemption from the WEP based upon a "partial months benefit" while the ALJ's rationale actually included such an allowance. (Administrative Transcript 2, 11).

Although the denial by the Appeals Council of the Petitioner's Request for Review, was an action that rendered the ALJ's decision as the "final" administrative decision upon which to litigate this case, the action of the Appeals Council is a significant component of this case. The arguments and conclusions as put forth by the Appeals Council are a part of the judicial record and the consistency in the application of law between the Appeals Council and the ALJ should be subject to the consideration

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[5] When the Social Security Administration's Appeals Council denies a claimant's request for review of an ALJ's decision, then the ALJ's decision becomes the final decision of the Commissioner. 20 C.F.R. § 404.981.

and review by a federal court[6]. In the case at bar, the record reveals that the Petitioner has consistently sought to litigate both the decisions of the ALJ and the Appeals Council[7] as evidenced in the district court complaint and brief. 42 U.S.C. § 405(g). A brief history concerning the concept of finality as it pertains to Social Security cases was previously provided by this Honorable Court in *Sims v. Apfel*, 530 U.S. 103, 106; 120 S.Ct. 2080, 2083; 147 L.Ed.2d 80, 85 (2000).

Respectfully, the Petitioner asserts that the lack of consistency in the interpretation and application of regulatory law along with the inconsistency between the reviewing Appeals Council and the "final" administrative decision as authored by the ALJ (the administrative trial judge), results in an administrative determination which is not deserving of the *Chevron* deference that was accorded by the Eleventh Circuit Court of Appeals. The Petitioner believes that a substantial base worthy of *Chevron* deference simply does not exist.

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[6] In 1998, the Eleventh Circuit acknowledged the existence of " . . . different approaches . . . " among the circuits concerning how new evidence (submitted to the Appeals Council following an ALJ's decision) should be considered by reviewing federal courts. *Falge v. Apfel*, 150 F.3d 1320, 1322-24 (11th Cir. 1998).

[7] *Falge v. Apfel*, 150 F.3d 1320, 1324 (11th Cir. 1998). See also, *Haws ex rel. Haws v. Apfel*, 61 F.Supp.2d 1266, 1285 (M.D. Fla. 1999) and *Bauger v. Apfel*, 65 F.Supp.2d 1345, 1353-54 (M.D. Fla. 1999). (These citations pertain to a Petitioner's appeal of an Appeals Council's determination.)

D. The Court of Appeals decision misinterprets a congressional report, an earlier district court decision and its rationale in this case is not consistent with its own precedent.

Following a discussion of why the Eleventh Circuit believed that *Chevron* deference was due in this case, the appellate court offered additional reasoning to support their holding. First, the Eleventh Circuit referenced a House of Representative's Conference Report. *Stroup*, at 1262. Appendix 9. Respectfully, the Petitioner asserts that the Eleventh Circuit's mention of how Congress perceived this issue at bar is not completely substantial as the referenced legislative history actually describes how the amount of a widow's/widower's benefit is to be calculated. The House of Representative's Conference Report did not address the central issue found in this case which pertains to the issue of eligibility for a pension payment " . . . after 1985 . . . " for an individual's own benefit. *See* H.R. Conf. Rep. No. 100-1104 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5322. Appendix 27.

Secondly, the Eleventh's Circuit's reference to *Johnson v. Sullivan*, 777 F.Supp. 741, 744 (W.D. Wis. 1991), overlooks the fact that in *Johnson*, the underlying Ohio state statute governing "receipt of pension benefits" recognized entitlement which was "effective on the first day of the next month . . . ". *Johnson*, at 742. In the Petitioner's case, the underlying Indiana state statute did not reference an effective day in the following month. (Administrative Transcript 26, 32, 33). More importantly, it should be noted that the *Johnson* decision was issued three and one-half years before the legal mandate of 60 Fed. Reg. 17,443 (1995) which requires reference to the pension-paying agency (the state).

There is yet another reason why the Eleventh Circuit should have judicially noticed 60 Fed. Reg. 17,443 (1995). In 1984, the Circuit Court had held that regulations in existence at the time of the administrative decision should be controlling. *Brady v. Heckler*, 724 F.2d 914, 919 (11th Cir. 1984). Obviously, an undisturbed and reasonable regulatory mandate in continuous existence since 1995 should have been honored in the year 2003.

E. The Proceeding involves a question of exceptional importance, in that circuit precedent preserving an agency's failure to apply pertinent contents of the Federal Register should not be permitted to stand.

While the Petitioner is grateful for the consideration and the courtesies extended to the parties by both the district and circuit courts, he maintains that this appeal involves a question of exceptional importance.

The Petitioner argues that the Commissioner's construction and application of the WEP is not reasonable in light of the inconsistency with the provisions of the Federal Register[6], statutory law and the lack of reference in the final administrative rationale (ALJ's decision) to the applicable Code of Federal Regulations.

The Petitioner asserts that *Chevron* deference to the Agency's interpretation was not appropriate. A plain reading of both the statutory and regulatory law leads to the inescapable conclusion that the Petitioner should not

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[6] 60 Fed. Reg. 17,443 (1995). See also, 60 Fed. Reg. 17,444 (1995).

be subject to the WEP reduction as he was first "eligible" for an Indiana state pension in 1985, not after 1985. Review of the Court of Appeals decision will restore harmony to the Circuits, ensure that the proper weighing of interpretive considerations is exhibited and allow for the correction of an error of law.

Respectfully submitted,

WILLIAM EARL HORNE, JR.
Attorney for the Petitioner, Ralph Stroup

October 2003

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12623

D.C. Docket No. 01-00230-CV-OC-GRJ

RALPH STROUP,

Plaintiff-Appellant,

versus

JO ANNE B. BARNHART, Social Security Commissioner,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida.

(Filed April 16, 2003)

Before TJOFLAT, ANDERSON and CUDAHY*, Circuit Judges.

CUDAHY, Circuit Judge:

Former police officer Ralph Stroup appeals a district court decision upholding the Social Security Administration's

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* Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

calculation of his disability benefits under the windfall elimination provision of the Social Security Act, 42 U.S.C. § 415(a)(7). Finding the Commissioner's construction of the windfall elimination provision reasonable, we affirm the decision of the district court.

I.

Ralph Stroup began working for the Kokomo, Indiana, Police Department (KPD) in January 1966. Under Indiana law and the KPD pension plan, he later qualified for retirement with pension benefits after completing twenty years of service. According to the City of Kokomo and the KPD, Stroup met this service requirement on December 31, 1985, upon completion of a shift ending at 4 p.m.[1] Stroup did not immediately retire; he remained employed with the KPD until March 1988, and continued to work elsewhere until 1998. In 1996 and in 1998, Stroup applied for Social Security disability benefits on the basis of his osteoarthritis and other ailments. The Social Security Administration (SSA) found him eligible for disability benefits as of January 1, 1996.

The present dispute has to do with the calculation of those benefits. It turns out that December 31, 1985, was legally a very consequential time to qualify for retirement. Two years earlier, Congress had enacted the windfall elimination provision (WEP) to Social Security to eliminate the unintended "double dipping" that accrued to

[1] A City of Kokomo letter actually states that Stroup became eligible on December 31, *1986*, but the Commissioner concedes that this must have been a clerical error.

workers who split their careers between employment taxed for Social Security benefits ("covered") and employment exempt from Social Security taxes ("noncovered"). The SSA determines a beneficiary's primary insurance amount (the figure on which the amount of actual benefits is partially based) from his average monthly earnings. 42 U.S.C. § 415. Prior to the enactment of the WEP, this calculation was completed without regard to whether the individual's wages were covered or noncovered. As a result, an individual who had worked for both covered and noncovered wages in the course of his employment history would receive both full Social Security benefits and whatever pension benefits were provided by his noncovered employment. The WEP, as codified at 42 U.S.C. § 415(a)(7), provides that the primary insurance amount for such individuals be computed using a modified formula. However, the WEP applies only if the applicant "first becomes eligible after 1985 for a monthly periodic payment." 42 U.S.C. § 415(a)(7)(A). Individuals who become "eligible" prior to 1986 are not subject to the WEP.

Stroup completed his required twenty years of service on the last day of 1985. The SSA determined that the WEP was applicable, significantly reducing (by as much as 40-60%, according to Stroup) his Social Security disability payments. This determination was upheld upon reconsideration by the SSA and also by an Administrative Law Judge (ALJ). The ALJ reasoned that, since Stroup worked through December 31, 1985, he could not have been eligible to receive a pension until January 1, 1986 – after 1985. Stroup appealed this decision to federal district

court, where a magistrate judge affirmed the ALJ's decision. Stroup appeals, arguing that he should not be subject to the WEP.[2]

II.

Questions of statutory interpretation are reviewed de novo. *United States v. Alborola-Rodriguez,* 153 F.3d 1269, 1271 (11th Cir. 1998). However, if we find the statute in question to be ambiguous, we must accord proper deference to the interpretation adopted by the agency to which Congress has delegated the administration of the statute. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Ninth Circuit has noted that the key relevant clause in the WEP, "who first becomes eligible after 1985 for a monthly periodic payment," is on its face ambiguous. *Das v. Dep't of Health and Human Servs.*, 17 F.3d 1250, 1253-54 (9th Cir. 1994). We agree. Standing alone, the statutory language could be

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[2] Stroup in his briefs also asked us to remand the case so that a complete review of his earnings record can be conducted. However, any concerns about the accuracy or completeness of his earnings record must be presented first to the SSA through its administrative appeals process. Stroup has not received a "final decision" from the SSA with respect to his earnings record that is subject to judicial review. *See Sims v. Apfel,* 530 U.S. 103, 106-07 (2000); *Crayton v. Callahan,* 120 F.3d 1217, 1220 (11th Cir. 1997). Stroup should, therefore, raise these concerns with the SSA.

Stroup does not challenge the constitutionality of the WEP. We note that other courts have considered and affirmed the constitutionality of the provision. *See Rudykoff v. Apfel,* 193 F.3d 579 (2d Cir. 1999); *Das v. Dep't of Health and Human Servs.*, 17 F.3d 1250, 1255-56 (9th Cir. 1994).

interpreted to support either Stroup's or the Commissioner's position in this case. The statute, however, does not stand alone. Acting pursuant to its broad statutory authority, 42 U.S.C. § 405(a)[3], the SSA issued a regulation specifying what is meant by "eligibility": "We consider you to first become eligible for a monthly pension in the first *month for which* you met all requirements for the pension except that you were working or had not yet applied." 20 C.F.R. § 404.213(a)(3) (emphasis added).[4]

According to the statute, for Stroup not to be subject to the WEP, he must have become "eligible" for his pension before 1986 – i.e., in December 1985. Under the definition of eligibility provided by the regulation, he clearly had not. The first *month for which* he met all the requirements was January 1986. To discern the operation of the critical word "for," consider two alternatives. Had Stroup completed twenty years of service by November 30, he would have met all the requirements for his pension *for* the entire month of December. The result would be less clear had Stroup completed his twenty years of service in mid-December. In that situation, Stroup would have met all

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[3] 42 U.S.C. § 405:

(a) Rules and regulations; procedures. The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

[4] In contrast, a person becomes "entitled" to benefits once he or she has actually stopped working and applied. *See* 20 C.F.R. 404.203.

the requirements for his pension *for* part of the month of December, and arguably would still have become eligible before 1986 (since the regulation does not explicitly state that eligibility begins only in the first *full* month). Because here Stroup worked through December 31, the opposite result is indicated: He did not become eligible until January 1986. Had the regulation read, instead, that a person becomes eligible in the month *in* which he or she meets all requirements for a pension, Stroup would have had a stronger case.

Stroup argues that the § 404.213(a)(3) definition of eligibility denies the statute's plain meaning. But, as we noted, the statute is ambiguous and has no plain meaning. Thus, we must determine the degree of deference to give the SSA regulation under *Mead*. The proper level of deference depends on the circumstances of each case, including the presence of congressionally delegated agency authority, the form of the agency action and, for those situations not clearly meriting *Chevron* deference, the factors laid out in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[5] *Mead*, 533 U.S. at 227-35. Here, the SSA argues that its regulation is due *Chevron* deference, meaning that it should be upheld as long as it is reasonable and not contrary to clear congressional intent. *Chevron*, 467 U.S. at 842-43. Stroup agrees that "considerable weight should normally be accorded" to the SSA's

[5] These other factors include "the thoroughness evident in [the agency action's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

statutory constructions. Appellant's Opening Br. at 10. The Supreme Court recently considered, in *Barnhart v. Walton,* 535 U.S. 212, 217-22 (2002), the degree of deference due to a statutory interpretation by the SSA in the form of a regulation formally promulgated pursuant to 42 U.S.C. § 405(a). The Court concluded that "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provide[d]," for that case, "the appropriate legal lens." *Walton,* 535 U.S. at 222. Especially in the absence of any argument to the contrary, we believe that these same factors, including especially the undeniably interstitial nature of the question at hand, dictate that *Chevron* should also apply to the case before us.

Stroup provides no persuasive argument that the regulation is unreasonable. We start by noting, in disagreement with Stroup, that the language of the statute does not preclude the interpretation given it by the Commissioner. *See Walton,* 535 U.S. at 218. Stroup's other arguments also fail to rebut *Chevron*'s presumption that the SSA's interpretation of the statute should be controlling. Stroup argues that the Commissioner should follow the mandate of 20 C.F.R. § 404.213(a)(3), which requires the SSA to "consider all applicable service used by the pension-paying agency," and defer to the KPD's belief that Stroup became "eligible to retire" after his shift on December 31. The Commissioner *is* considering all applicable service, but does not have to accept KPD's statement as a valid legal conclusion when the SSA has its own definition of "eligibility" that is controlling here. Stroup also points

to intra-agency documentation showing that the SSA was not always certain that the WEP applied to Stroup.[6] District Ct. Tr. at 40. First, upon review of the document, we do not believe it evinces any "struggle" in the SSA's interpretation and application of the WEP, as Stroup has characterized it. Second, a temporary, nonpublic uncertainty (here, an acknowledgment that there is "not much in writing" on point and the use of the qualifier "probably") can hardly bind the Commissioner in this proceeding. At most, inconsistency in an agency's position is one factor in determining how much deference is owed, *Mead,* 533 U.S. at 228, and we believe that *Chevron* deference is owed here. Finally, we note that the document's reasoning and conclusion is entirely consistent with respect to Stroup's situation. The only arguable inconsistency in the

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[6] The relevant part of this document, entitled "Claims Folder/ Material Transmittal", states:

> We need to look at the date they were eligible to receive the pension as opposed to the date they were eligible to retire, as they are not necessarily the same. If he was not eligible to retire until COB on 12/31/85, it would seem highly unlikely that he would be eligible to the pension prior to 1/1/86. The pension plan would need to provide that he could receive a pension for at least one day of December 1985 for the exemption to be met.
>
> There's not much in writing about this. An old NEWS item from 11/27/85 that I kept a copy of stated: 'Those eligible for either a Social Security benefit or a non-covered pension prior to 1986 are exempt from WEP. This means that a Civil Service retiree with 30 years of service who attains age 55 on December 15, 1985 is first eligible for a pension for the month of January 1986. Therefore WEP applies.' This is similar to your situation in that even though the eligibility requirements for retirement were met in 12/85, pension eligibility (probably) did not exist until 1/86.

(The word "probably" was apparently added with a pen (under a caret) after the document was typed and printed.)

document is an internal one, and relates to whether a person qualifying for retirement in mid-December 1985 would be subject to the WEP, a question not before us.

If anything, the Commissioner has provided much evidence of the SSA's consistency in its interpretation and application of the WEP, further validating deference. For example, the SSA's Program Operations Manual System (POMS) states that for claimants to be free from the WEP under an early-out retirement provision, they "must provide evidence" that they "could have received a pension payment *for* December 1985 or earlier." POMS DG 3696.D3 (emphasis added). While the POMS does not have the force of law, it can be persuasive. *Bubnis v. Apfel,* 150 F.3d 177, 181 (2nd Cir. 1998); *Davis v. Sec'y of Health and Human Servs.*, 867 F.2d 336, 340 (6th Cir. 1989); *Evelyn v. Schweiker,* 685 F.2d 351, 352 n.5 (9th Cir. 1982). The Commissioner's interpretation is also consistent with Congressional understanding of the WEP as evinced in a conference report discussing a modification of the statute. *See* H.R. Conf. Rep. No. 100-1104 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5322 (describing "the first month the individual is eligible for both . . . pension and social security" as "the first month he or she could receive both . . . benefits if he or she applied for them – the month of 'concurrent eligibility' ").

Finally, we note that our holding today is in harmony with other courts that have addressed the interpretation of the WEP. *See Johnson v. Sullivan,* 777 F. Supp. 741, 744 (W.D. Wis. 1991) ("Accordingly, an individual who turns 62 in December . . . is 'eligible' for . . . benefits in January."); *see also Das,* 17 F.3d at 1254 (citing the above conference report and holding that Das was subject to the WEP because, although his pension plan vested prior to 1986,

he could not have received benefits before 1986 since he turned 62 in 1988).

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RALPH STROUP,

Plaintiff,

-vs-

Case No.
5:01-CV-230-OC-GRJ

JO ANNE B. BARNHART,
Commissioner of Social Security,[1]

Defendant.

_____/

ORDER

(Filed Apr. 5, 2002)

Plaintiff appeals to the district court from a final decision of the Commissioner of Social Security [the "Commissioner"] applying 42 U.S.C. §415(a)(7)(A) and (B), Section 215(a)(7)(A) of the Social Security Act,[2] to the calculation of his primary insurance amount (PIA). (Doc. 1). The Commissioner has answered (Doc. 4) and both parties have filed briefs outlining their respective

[1] Jo Anne B. Barnhart became Commissioner of Social Security on November 9, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Jo Anne B. Barnhart should be substituted, therefore, for Larry G. Massanari, as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] The provisions of 42 U.S.C. §415(a)(7)(A) and (B), Section 215(a)(7)(A) of the Social Security Act are commonly known as the windfall elimination provision (WEP).

positions (Docs. 9 & 10). For the reasons set forth below, the Commissioner's decision is **AFFIRMED**.

I. PROCEDURAL HISTORY

Plaintiff filed applications for disability insurance benefits on October 11, 1996, and February 24, 1999.[3] (R. 16-19, 20-22). On August 20, 1999, Plaintiff was found to meet listing 1.03 of the listing of impairments, 20 C.F.R. Pt. Subpart P. App. 1. (R. 23-24). He was subsequently notified that his Social Security benefits were subject to the windfall elimination provisions of section 215(a)(7) of the Act because he was eligible to retire after 1985 with a pension not covered by Social Security.[4] Plaintiff requested reconsideration, and then an "on-the-record" determination, in lieu of hearing, by an administrative law judge ("ALJ"). (R. 29-30, 37-39, 41-44). On November 30, 2000, ALJ Arthur W. Stacy issued an unfavorable decision. (R. 10-12). On January 2, 2001, the Plaintiff filed a request for review by the Appeals Council. (R. 4-6). On May 4, 2001, the Appeals Council denied review and adopted the decision of the ALJ as the final decision of the Commissioner. (R. 2-3). Accordingly, Plaintiff filed this action seeking review of the Commissioner's decision. (Doc. 1).

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[3] It is unclear why Plaintiff filed a second application, as he was apparently granted benefits based on the first application. *See* R. 23. Neither party provides any explanation for the second application, and its existence does not appear to be germane in any way to the resolution of the issue before the Court.

[4] The actual initial notification is not contained in the file. The parties agree, however, that Plaintiff was so notified.

II. ISSUES PRESENTED

The Plaintiff's Brief (Doc. 9) presents two primary arguments. First, Plaintiff argues that the ALJ erred by applying the windfall provision to the calculation of Plaintiff's PIA. Second, Plaintiff's attorney questions whether Plaintiff was aware of his waiver of his right to appear at hearing before the ALJ.

In response, the Commissioner argues that substantial evidence supports the ALJ's decision. (Doc. 10.) Defendant contends that the Commissioner properly applied the windfall offset provision and that Plaintiff did not meet his burden of proof on the issue. Defendant further claims that Plaintiff has not demonstrated any mistake was made in his hearing request. In connection with this issue, Defendant asserts that there was no failure to fully develop the record, nor reversible error.

III. THE STANDARD OF REVIEW AND THE LAW

A. Standard of Review

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. *Foote v. Chater*, 67 F.3d 1553, 1560 (11th Cir. 1995), *citing Walden v. Schweiker*, 672 F.2d 835, 838 (11th Cir. 1982) and *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *accord, Edwards v. Sullivan*, 937 F.2d 580, 584 n.3 (11th Cir. 1991).

Where the Commissioner's decision is supported by substantial evidence, the district court will affirm, even if the reviewer would have reached a contrary result as finder of fact, and even if the reviewer finds that the evidence preponderates against the Commissioner's decision. *Edwards v. Sullivan*, 937 F.2d at 584 n.3; *Barnes v. Sullivan*, 932 F.2d 1356, 1358 (11th Cir. 1991). The district court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. *Foote*, 67 F.3d at 1560; *accord, Lowery v. Sullivan*, 979 F.2d 835, 837 (11th Cir. 1992) (court must scrutinize the entire record to determine reasonableness of factual findings); *Parker v. Bowen*, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

B. The Windfall Offset Provision

A PIA is the basic figure the Social Security Administration uses to find the monthly benefit actually payable to a beneficiary and members of his family. *See* 20 C.F.R. §404.213. When calculating the PIA of an individual who split his career between employment covered by the Social Security Act and noncovered government employment, the WEP, 42 U.S.C. §415(a)(7)(A) and (B), Section 215(a)(7)(A) of the Act, applies. The application of the WEP requires Social Security to use a smaller percentage of the individual's PIA than 42 U.S.C. §414(a)(1) would normally require, to prevent the individual from receiving excess federal benefits. *See* 20 C.F.R. §404.213; *see also Das v. Dep't of Health and Human Servs.*, 17 F.3d 1250, 1253 (9th Cir. 1994) (an individual who worked for both covered and noncovered wages would receive a windfall absent the WEP because he would be eligible for both social security

benefits and federal civil service pension payments. The WEP prevents this windfall by modifying the standard formula for calculating monthly benefits); *Johnson v. Sullivan*, 777 F.Supp. 741, 743 (W.D. Wis. 1991) (the WEP is "intended to prevent applicants from receiving excess pension (or other) benefits because their careers were split between Social Security employment and government employment not covered by Social Security").

The PIA calculation is modified due to application of WEP for months after 1985 in which a person is entitled to disability benefits and a monthly pension for which he became eligible after 1985 based in whole or part on earnings in employment not covered under Social Security. 42 U.S.C. §415()(7)(A) and (B), Section 215(a)(7)(A); 20 C.F.R. 404-213(a)(3). A person is considered eligible for a monthly pension in the first month for which he meets all the requirements for the pension except that he was working or had not yet applied. 20 C.F.R. 404.213(a)(3).

IV. SUMMARY OF THE RECORD EVIDENCE

Plaintiff submitted a letter from the Kokomo (Indiana) Police Department, dated October 27, 1998, which stated that he began employment there on January 1, 1966, and therefore would have been eligible to retire after completion of his day's work on December 31, 1985. (R. 26, 36). Plaintiff continued his employment through March 21, 1998.[5] (R. 26, 36). An October 7, 1999, letter from Lori

[5] An employee of the Social Security Administration contacted Kokomo Police Department's human resources department to clarify Plaintiff's retirement date and was informed that he retired on March

(Continued on following page)

Dutton, Deputy Controller of the City of Kokomo, stated that a policeman working from January 1, 1966, would be eligible for retirement benefits after completing his work day on December 31, 1986.[6] Ms. Dutton attached copies of Indiana code sections documenting the requirement of twenty years of service for a police officer to retire. (R. 33-35).

After Social Security determined that WEP applied in Plaintiff's case, Plaintiff pursued his administrative remedies with the assistance of a non-attorney representative, Robert Stutler. (*See e.g.*, R. 41, 43). Mr. Stutler was associated with Government Benefits Information Services, Inc. (R. 43). On April 28, 2000, a Request for Hearing by Administrative Law Judge was filed, signed by Mr. Stutler. (R. 41). Item number seven on the Request for Hearing requires one of two blocks to be checked, indicating whether the claimant wishes to appear at hearing or not. On Plaintiff's request for hearing, the box was checked beside the statement, "I do not wish to appear and I request that a decision be made based on the evidence in my case." (R. 41) An accompanying letter from Mr. Stutler stated that a hearing was requested with regard to whether the WEP should apply and that the judge should make an on the record decision. (R. 43).

21, 1988; the October 27, 1998, statement that he had retired on March 21, 1998, was a typographical error.

[6] While the letter states "December 31, 1986", the Court notes that January 1, 1966, through December 31, 1986, would be 21 years, and assumes the date intended was December 31, 1985.

V. DISCUSSION

Plaintiff contends that the ALJ erred in two respects. First, he asserts that the ALJ erred by finding that the WEP applied to calculation of his PIA because he became eligible for retirement at the end of his shift on December 31, 1985. Second, Plaintiff requests a supplemental administrative hearing as "Plaintiff seemed to be unaware of this waiver" of his right to a hearing before the ALJ.

The dispute between the parties in this case may be distilled into a simple question: when was Plaintiff eligible for retirement benefits from Kokomo Police Department? Plaintiff claims to have been eligible the day he completed twenty years' service, December 31, 1985. The ALJ found Plaintiff eligible the day after he completed his twenty years, January 1, 1986. Because WEP applies only to months after 1985, this question is significant. *See* 20 C.F.R. 404.213(a)(3). Plaintiff correctly points out that the regulations require the Commissioner to consider all applicable service used by the pension-paying agency. *Id.* The ALJ did so, noting, in fact, that Plaintiff was required to work on December 31, 1985, to complete his twenty years and be entitled to his pension, effective January 1, 1986.

Further, assuming *arguendo* that Plaintiff had retired at the end of his shift on December 31, 1985 he, nonetheless, only would have been eligible to receive payment of his pension no earlier than the next day, January 1, 1986. As such, the Commissioner correctly concluded that Plaintiff became eligible for a pension after 1985, and thus calculation of Plaintiff's PIA was properly subject to the WEP. Accordingly, because the ALJ's determination comports with the applicable law and is supported by

substantial evidence, the Commissioner's decision on this issue is due to be affirmed.

Secondly, Plaintiff claims that he "seemed to be unaware" of his waiver of a hearing before the ALJ and, thus, the matter should be remanded to permit him to testify. There is no reason to conclude that the waiver was not proper nor is there any reason to conclude that a remand would produce any different result in view of the fact that the determination by the ALJ was largely a legal determination.

The regulations provide for a request for hearing by written request. *See* 20 C.F.R. §§404.930, 404.933. The regulations further provide for representation of a party by an attorney or a non-attorney representative. 20 C.F.R. §§404.1700 *et seq.* A representative may, on a claimant's behalf, make any request or give any notice about the proceedings before the administration. 20 C.F.R. §404.1710(a)(4). The record contains an Appointment of Representative form, wherein Plaintiff duly appointed Robert Stutler as his representative. (R. 15). Accordingly, the regulations authorized Plaintiff's non-attorney representative to submit the request for hearing on Plaintiff's behalf, and authorized Plaintiff's representative to indicate on that form that Plaintiff did not wish to appear and wished the decision to be issued based on the evidence in the administrative record. Plaintiff has not alleged that his representative was not properly appointed or not authorized to waive a hearing. Nor has Plaintiff alleged that a mistake was made in the waiver or that either Plaintiff or Mr. Stutler lacked mental capacity or could not understand the directions on the form. Furthermore, Plaintiff does not allege that the record before the ALJ was incomplete in any way. Plaintiff's position on the

applicability of the WEP is abundantly clear. Remand would add nothing further for the ALJ to consider which would or could change the result. Accordingly, the Court concludes that no error has been alleged regarding the Commissioner's actions involving the issuance of the ALJ decision and on independent review of the record and proceedings, none is found.

VI. CONCLUSION

For the reasons discussed above, the decision of the Commissioner is **AFFIRMED** pursuant to sentence four of 42 U.S.C. §405(g). The Clerk of the Court is directed to enter judgment accordingly, and to close the file.

DONE AND ORDERED at Ocala, Florida this 5th day of April, 2002.

/s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

Copies to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12623-DD

RALPH STROUP,

Plaintiff-Appellant,

versus

JO ANNE B. BARNHART,
Social Security Commissioner,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 15, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT, ANDERSON and CUDAHY*, Circuit Judges.

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* Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

42 U.S.C. § 415(a)(7)(A) and (B)

7) (A) In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who –

(i) attains age 62 after 1985 (except where he or she became entitled to a disability insurance benefit before 1986 and remained so entitled in any of the 12 months immediately preceding his or her attainment of age 62), or

(ii) would attain age 62 after 1985 and becomes eligible for a disability insurance benefit after 1985,

and who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding (I) a payment under the Railroad Retirement Act of 1974 or 1937, (II) a payment by a social security system of a foreign country based on an agreement concluded between the United States and such foreign country pursuant to section 233 [42 USCS § 433], and (III) a payment based wholly on service as a member of a uniformed service (as defined in section 210(m) [42 USCS § 410 (m)])) which is based in whole or in part upon his or her earnings for service which did not constitute "employment" as defined in section 210 [42 USCS § 410] for purposes of this title [42 USCS §§ 401 et seq.] (hereafter in this paragraph and in subsection (d)(3) referred to as "noncovered service"), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B).

(B)(i) If paragraph (1) of this subsection would apply to such an individual (except for subparagraph (A) of this

paragraph), there shall first be computed an amount equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that for purposes of such computation the percentage of the individual's average indexed monthly earnings established by subparagraph (A)(i) of paragraph (1) shall be the percent specified in clause (ii). There shall then be computed (without regard to this paragraph) a second amount, which shall be equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that such second amount shall be reduced by an amount equal to one-half of the portion of the monthly periodic payment which is attributable to noncovered service performed after 1956 (with such attribution being based on the proportionate number of years of such noncovered service) and to which the individual is entitled (or is deemed to be entitled) for the initial month of his or her concurrent entitlement to such monthly periodic payment and old-age or disability insurance benefits. The individual's primary insurance amount shall be the larger of the two amounts computed under this subparagraph (before the application of subsection (i)) and shall be deemed to be computed under paragraph (1) of this subsection for the purpose of applying other provisions of this title [42 USCS §§ 401 et seq.],

(ii) For purposes of clause (i), the percent specified in this clause is –

(I) 80.0 percent with respect to individuals who became eligible (as defined in paragraph (3)(B)) for old-age insurance benefits (or became eligible as so defined for disability insurance benefits before attaining age 62) in 1986;

(II) 70.0 percent with respect to individuals who so become eligible in 1987;

(III) 60.0 percent with respect to individuals who so become eligible in 1988;

(IV) 50.0 percent with respect to individuals who so become eligible in 1989; and

(V) 40.0 percent with respect to individuals who so become eligible in 1990 or thereafter.

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60 Fed. Reg. 17,443 (1995)

*60 FR 17443, **

FEDERAL REGISTER

Vol. 60, No. 66

Rules and Regulations

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

Social Security Administration (SSA)

20 CFR Part 404

RIN 0960-AD72

Computing Benefit Amounts, Disposing of Underpayments, Resolving Overpayments, and Payment Restriction

DATE: Thursday, April 6, 1995

ACTION: Final rules.

[*17443]

SUMMARY: We are revising our rules on computation of benefits to define the term "first becomes eligible" as it relates to a pension based on noncovered employment. We are also revising the computation rules to provide that we will consider all government service used by a pension-paying agency when we determine whether an individual first became eligible before 1986 for a pension based on noncovered employment. Further, we are also revising our rule on determining fault regarding overpayments to state that benefit deductions because of net earnings from self-employment are not applicable after an individual attains age 70. Additionally, we are revising our rules on underpayments to clarify a misleading cross-reference. Finally, we are updating the list of countries to which benefit payments are withheld because of Treasury Department restrictions.

DATES: These regulations are effective April 6, 1995.

* * *

SUPPLEMENTARY INFORMATION: Section 215(a)(7) of the Social Security Act (the Act) requires us to use a modified formula for computing the primary insurance amount (the basic benefit amount) of an individual's old-age or disability Insurance benefit if the individual first becomes eligible after 1985 for such a benefit and for a monthly periodic payment based on noncovered employment. The modified formula applies to individuals who are concurrently entitled to such a monthly periodic payment and to old-age or disability benefits under title II of the Act. It results in a lower primary Insurance amount than would have been computed if the monthly periodic payment had not been considered. However, neither the Act

nor our regulations at 20 CFR 404.213 define the phrase "first becomes eligible."

In defining "first becomes eligible," we have identified two interpretations which pertain to the date creditable service is acquired. One interpretation is that an individual first becomes eligible when he or she has currently acquired enough service to qualify for a pension. The other interpretation is that an individual first becomes eligible when he or she has acquired enough service to qualify for a pension, regardless of when the service was acquired.

We recently became aware that some individuals have purchased credit for prior service, e.g., military service, which could affect their eligibility date and allow them to become eligible before 1986 for a monthly pension based on noncovered employment. Such an individual would thus be excluded from the modified computation because he or she first became eligible for the monthly pension before 1986. There is no restriction in the Act which precludes using purchased credit to establish eligibility before 1986 for a monthly pension based on noncovered [*17444] employment and we see no reason not to consider purchased credits when deciding whether the modified computation applies.

We have adopted the interpretation that we will consider all applicable service used by the pension-paying agency, regardless of when the service was acquired. Under this interpretation, an individual "first becomes eligible" for a monthly periodic payment for the first month (including a past month) that the individual meets all the requirements for the payment except stopping work or applying for the payment. We are, therefore, amending § 404.213(a)

to include the definition of "first becomes eligible" and our policy on applicable service.

* * *

H.R. Conf. Rep. No. 100-1104 (1998), reprinted in 1998 U.S.C.C.A.N. 5048, 5322

12. Calculation of windfall benefit guarantee amount based on pension amounts payable in the first month of concurrent entitlement rather than concurrent eligibility.

Present Law

Under the windfall benefit provision, a special formula is used to compute the social security benefits of workers who are also eligible for pensions based on noncovered employment. The "windfall guarantee" assures that the resulting reduction in the social security benefit will not exceed one-half of the amount of the noncovered pension. The amount of the noncovered pension used in this calculation is the amount payable in the first month the individual is *eligible* for both the pension and social security (i.e., the first month he or she could receive both of these benefits if he or she applied for them – the month of "concurrent eligibility"). This amount is used regardless of whether the individual actually receives (i.e., is *entitled* to) the benefits at that time.

To compute an individual's benefits, the Social Security Administration must ask the individual's pension administrator to determine the pension amount that would have been payable at the date of first concurrent eligibility for both the pension and social security (usually

age 62) regardless of the pension amount which the person will actually receive upon entitlement. Processing delays and errors can occur when pension administrators make this fictitious computation of the pension amount.

House Bill

The amount of the pension considered when determining the windfall guarantee would be the amount payable in the first month of concurrent *entitlement* to both social security and the pension from noncovered employment.

The provision would be effective for benefits based on applications filed after the month in which this Act is enacted.

Senate Amendment

No provision.

Conference Agreement

The conference agreement follows the House bill.

[Page] 5322